No. 201.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

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ALFRED V. BOOTH, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY ARGUMENT.

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The plaintiff in error was convicted of a violation of section 130 of the Criminal Code of Illinois, which is as follows:

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than ten dollars, nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void" (Record, p. 6).

The offense for which the plaintiff in error was indicted and convicted under this statute consisted in entering into a contract with the Weare Commission Company, doing business as a commission company in Chicago and on its board of trade, by which he reserved the right to buy at any time within ten days ten thousand bushels of corn at 31½ cents per bushel, and paid a consideration for this privilege, which he subsequently exercised, and the corn was delivered to him (Record, p. 17). There is no claim made that the transaction was not in the utmost good faith. The Weare Commission Company had the corn to sell; at least, there is no hint in the evidence to the contrary. The plaintiff in error, not knowing whether the exigencies of his business would require this corn, paid for the privilege of taking it at the price named if he should require it—as he subsequently did.

For this transaction he was indicted and punished as a criminal.

Against these proceedings, at every stage, he sought to interpose the shield of the Federal Constitution, asserting that such action by the State deprived him of his liberty and property without due process of law. For this reason he moved to quash the indictment (Record, p. 14), in arrest of judgment (Record, p. 28), and assigned errors based thereon (Record, pp. 30, 31) in the supreme court of Illinois, which decided against the right claimed under the Constitution (Record, p. 35), holding the act in question a proper exercise by the State of its police power.

From this action a writ of error was prosecuted to this court.

Option contracts, as usually understood in the commercial and legislative world, are described by Mr. Tiedeman, in his State and Federal Control of Persons and Property, as follows (vol. 1, p. 470):

"Option contracts are in form contracts for the sale or purchase of commercial commodities for future delivery, at a

certain price, with the option to one or both of the parties in settlement of the contract to pay the difference between the contract price and the price ruling on the day of delivery, the difference to be paid to the seller, if the market price is lower than the contract price, and to the purchaser if the market price is higher. Such a contract has three striking elements: First, it is a contract for future delivery; secondly, the delivery is conditional upon the will of one or both of the parties; and thirdly, the payment of differences in prices, in the event that the right of refusal is exercised by one of the parties. If the common-law offense of *regrating* were still recognized in the criminal law, all contracts for future delivery may be open to serious question. But that rule of the common law is repudiated, and it may now be considered as definitely settled that a contract for future delivery of goods is not for that reason invalid. * * * The late English opinion is generally followed in the United States, and it may be stated as the general American rule, that *bona fide* contracts for the future delivery of goods are not invalid, because at the time of sale the vendor has not in his actual or potential possession the goods which he has agreed to sell."

The author cites many authorities in support of this statement, among others Lewis *vs.* Lyman, 22 Pick., 437; Thrall *vs.* Hill, 110 Mass., 328; Heald *vs.* Builders' Ins. Co., 111 Mass., 38; Currie *vs.* White, 45 N. Y., 822; Bigelow *vs.* Benedict, 70 N. Y., 202; Bruce's Appeal, 55 Pa. St., 294; Logan *vs.* Musick, 81 Ill., 415; Pixley *vs.* Boynton, 79 Ill., 351; Pickering *vs.* Cease, 79 Ill., 328; Lyon *vs.* Culbertson, 83 Ill., 33; Corbett *vs.* Underwood, 83 Ill., 324; Sanborn *vs.* Benedict, 78 Ill., 309; Wolcott *vs.* Heath, 78 Ill., 433; White *vs.* Barber, 123 U. S., 392.

That option contracts as above defined are within the police power of the State we concede. There is the option to one or both of the parties in settlement of the contract to pay the difference between the contract price and the market price on the day of delivery—an element wholly wanting in the contract upon which the plaintiff was convicted. The grain was actually delivered and there could be no gambling

If there had been no delivery there neither would nor could have been any settlement in differences, as, whatever the market, neither party would have been under further obligations to the other.

The statute was enacted at a time (1874) when the above definition, as given by Mr. Tiedeman, was the universal understanding of the term "option contracts" as a means of gambling. There can be no reasonable doubt that such transactions were the objects of legislative condemnation. Gambling in differences had become a great evil, and its corrupting influence was felt in every walk of life. Such contracts in the absence of the statute were illegal and punishable at common law. Owing to this fact the supreme court of Illinois made, as we conceive, one of those mistakes which invade even courts of last resort, and lead to the most unexpected and unforeseen consequences. Inasmuch as contracts to settle in differences were illegal at common law, the court reached the conclusion that it could not have been the legislative intention to make that illegal which was already so, and consequently it must have been intended to apply to contracts that had been perfectly legal and unimpeachable before (Schneider *vs.* Turner, 130 Ill., 28), and this construction has been since adhered to and applied in matters wholly removed from gambling. The error of the court arose from the fact that it failed to note that the primary purpose of the act was to adequately punish gambling, not to define what contracts should be avoided for that taint. The growing evil called for severer punishments, and therefore the offense was made a crime and severely punished, instead of a misdemeanor subject only to a paltry fine. I have noticed this mistake of the court, which I deem obvious, not because I suppose you will sit to review this error of construction, but as a part of the history of the case which has led to this necessary appeal to your powers

under the fourteenth amendment to protect the citizen in his liberty and property against State action.

It is proper now to turn to some examples of this construction of the act.

In Schneider *vs.* Turner, 130 Ill., 28, where this error originated, the contract was as follows:

"CHICAGO, *November the 11th*, 1885.

"In consideration of one dollar and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Snyder, William L. Peck, Fred. W. Peck, 1,786 shares of the capital stock of the North Chicago City railway at $600 per share if taken on or before the 15th day of December, 1885.

"V. C. TURNER."

On this contract the court said:

"Prior to this act it was lawful to contract to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. There was and is nothing illegal or immoral in an option contract in itself."

The contract was avoided wholly because the court imputed to the legislature the intention, not of adequately punishing gambling, but of making something illegal which was not before so.

A like result followed in Corcoran *vs.* Lehigh and Franklin Coal Company, 138 Ill., 390, where the coal company made a written offer to sell and deliver 12,000 tons of coal at a price named, and included in its offer the following:

"Should you require any coal on our dock, we will name you fifty cents per ton in advance of above prices during the season, provided you purchase the above order from us."

Which offer was accepted, the coal taken and paid for. The dealer, desiring to avail himself of the option embraced in the contract, was refused, coal having largely advanced

in price, and the supreme court sustained such refusal because of the statute in question. The court found nothing in the contract in any way immoral or which any prudent merchant should not in the wise conduct of his business reasonably wish to make; and yet it held, owing to the misapprehension above noted, that a statute passed to prevent gambling, in the interest of the public morals, could be used, as in Schneider *vs.* Turner, 130 Ill., 28, for the immoral end of escaping a just obligation. The same thing happened in Keeting *vs.* Hilton, 51 Ill., App., 437, where a party entered the service of a company at an agreed price, and as a part of the consideration reserved to himself the privilege of buying the business within a time limited. It was evident that he would not have entered upon the service apart from this privilege. The court enabled the employer to escape this contract obligation by reason of the statute. What was moral and valid prior thereto and within the contract rights of each person at common law was held to be forbidden by the statute as construed by the supreme court of the State. In every instance where the statute has been applied by the courts it has been in aid of some person seeking to escape plain contract liability and where no element of gambling was present. Thus, in Schlee *vs.* Guckenheimer, 179 Ill., 593, the court, while helping the person in default to escape his honest obligation, said :

"By the common law contracts of this character are valid as under the common law the contract to have or give an option to sell or buy at a future time grain or other commodity was neither voidable nor void."

The court says in its decision of the present case that the purpose of the legislature was to suppress gambling.

"The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future, in which the delivery and acceptance of the grain so contracted for is *bona fide* contemplated and intended by the parties, but in con-

tracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article" (Record, p. 37).

This is unquestionably true.

But the court continues:

"Clearly a contract which gives to one of the contracting parties a mere privilege to buy corn and does not bind him to accept and pay for it is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for mere wagers on the price of grain than contracts which create the relation of vendor and vendee."

This is important if true. It will be admitted that "coal," "meat," "hay," or other commodity may be substituted in lieu of the word "corn" in the court's statement. All are embraced in the language of the statute, and, as we have seen, one of them has been embraced in the decisions. It is perhaps not important that only one case has been found where such a privilege has been made the instrument of gambling, while multitudes of cases are found where there were purchases and sales. Nor is it perhaps important that there can be no settlement in differences until the call has been made or the property tendered—in other words, until it has ceased to be a privilege and has assumed such a form as, using the language of the court, "creates the relation of vendor and vendee."

Nor is it of the highest importance that if this is good law then every contract of the Army and Navy Department made or to be enforced in Illinois is likewise bad. As is well known, the Departments advertise for supplies—*e. g.*, meat, grain, hay, etc.; bids are solicited and bidders notified that the Department reserves the right to take all or any part of the amount specified. In other words, the Department reserves a call on the commodity. Chicago

dealers were the successful bidders for nearly all the meat contracts during the late Spanish war. Suppose, when the forces were in the field and the commissary department was doing its utmost to forward supplies, the dealers had suddenly repudiated their contracts on the ground they were made unlawful contracts, and so immoral, by section 130 of the Criminal Code of the State. This might happen. The dealers may yet be arrested and punished as criminals for having made such contracts.

While, as I have said, these several facts are perhaps unimportant, they become important when combined and all pointing in one direction.

This court has held (Mugler *vs.* Kansas, 123 U. S., 623, 661) that—

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. * * *

"The courts are not bound by mere forms nor are they to be misled by mere pretences. They are at liberty—indeed are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge and thereby give effect to the constitution."

Tried by this test, it is insisted that a contract valid at common law, moral in all its elements as declared by the court, not used for gambling, incapable of use to create a condition by which a settlement in differences could be made and applied in court decisions only for the immoral purpose of allowing people to violate honest contracts and leading to such absurd results that both the packers and Federal officers who executed contracts for army supplies are subject to fine and imprisonment, cannot be a reasonable exer-

cise of the police power. In fact, no example could be more absurd than that afforded by the case of the plaintiff in error. He is indicted and fined for not knowing before he was advised by acceptances whether he would need the corn or not, or, stating it in another way, he is punished for not buying absolutely on August 16th what he did not know he would need until August 25th or 26th. The necessity for grain dealers making large offers abroad to take this form of insurance or provision for the future is fully set forth in the evidence (Record, pp. 18, 19).

The construction put upon the act by the supreme court of Illinois is obligatory upon this court, and for the purpose of determining the constitutionality of the statute this construction must be deemed a part of the statute (Machine Co. *vs.* Gage, 100 U. S., 676, 677; Geer *vs.* Connecticut, 161 U. S., 519, 522; Erie R. R. Co. *vs.* Pennsylvania, 158 U. S., 431; Forsyth *vs.* Hammond, 166 U. S., 506, 519).

While, as said in Lake Shore & Michigan Southern Railway *vs.* Ohio, 173 U. S., 285, 301, "the reasonableness or unreasonableness of a State enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority or is to be deemed a legitimate exercise of the power of the State to protect the public interests or promote the public convenience," yet we consider that the courts will not set aside such legislation merely because it is unnecessarily harsh and oppressive. As the court said, such fact is an element in the question; but when we add to this element that the act as construed does not have the effect desired, and at the same time takes from the citizen a right of contract belonging to him at common law, having no taint of immorality, we have a plain case of the unnecessary deprivation of liberty and property designed to be protected against State action by the fourteenth amendment.

If this court shall say to the Illinois authorities that in the exercise of the police power you can forbid and punish

every contract where there is present any intention to settle in differences—any element of gambling,—it is not a reasonable exercise of your power, however, to forbid contracts valid and moral at common law and entered into with no intention of gambling, but in the proper pursuit of commercial gain. Contracts for future delivery are the ordinary means by which gambling in differences is accomplished, and yet to forbid persons to buy or sell for future delivery would paralyze commerce and industry and bankrupt the nation. Such a law would not be reasonably necessary to prevent the evil which it is your province and duty to check. Equally the commercial necessities require and the common-law rights of the citizen guaranteed by this amendment demand that the right of contract shall not be unnecessarily abridged or taken away. The citizen is not able to foresee today the demands of his business a month or six months hence. He has a right to take thought for the morrow and contract conditionally upon such necessities just as the owner of the commodity has the same right to make a conditional as an absolute sale. Gambling may be prevented without interference with legitimate commerce. It is not to be tolerated that a citizen who has made an optional purchase of a commodity of commerce and thereafter exercised his option and taken and paid for the same shall be thereafter indicted and punished as having committed a crime.

It is submitted that such limitation upon the police power of the State is within the necessary meaning of the fourteenth amendment and the decisions of this court in Holden *vs.* Hardy, 169 U. S., 366; Allgeyer *vs.* Lousiana, 165 U. S., 366; Williams *vs.* Fears, 179 U. S., 270, 274.

It is not contended that new rights were given the citizen by this amendment, but only a new guaranty, which added the right to seek the judgment of this court in all cases where the claim is made that the guaranty is violated. It is believed that those inalienable rights of man which were embodied in the Declaration of Independence and protected

against the action of the Federal Government by the first amendments were by these later amendments likewise and to an equal extent protected against State action.

The claim is made in a brief filed by the attorney general of the State that the power to pass police regulations is not restricted by any constitutional limitation, and the Slaughter House Cases, 16 Wall., 36; Barbier *vs.* Connolly, 113 U. S., 32; Mugler *vs.* Kansas, 123 U. S., 623, are cited as sustaining this statement. It is not thought necessary to examine this proposition at length. It is true that in some of the cases general language has been used sufficiently broad to justify such an interpretation by the unprofessional reader. The statement is not, however, a correct one in the light of the discussion of the scope and extent of the police powers of the State in their relation to the powers and guaranties of the Constitution, which has gone forward in this court from the time the term police power was first used by Chief Justice Marshall in Brown *vs.* Maryland to the present. This much may now be considered settled.

The regulation of the rates of public service corporations is a proper exercise of the police powers of the States. This power, however, is restricted by the constitutional limitation that such rates must be reasonable. To prescribe and enforce unreasonable rates is to take property without due process of law. The question whether the rates are in fact reasonable is therefore a judicial question.

The States may properly pass any laws deemed essential to the preservation of the public health, morals, and safety. In my judgment the police power, as Chief Justice Marshall used the term, embraced all that mass of subjects not embraced in the grants to the Federal Government. This power, however, even when exercised with reference to such important matters as public health or morals, is subject to the constitutional limitation that the law must be reasonable and not amount to a denial of rights secured to the citizen through the Constitution; for example, inspection

laws may be enacted, but if they are so framed as to be prohibitive of a legitimate article of interstate commerce they are invalid. The decree of the State legislature that the article shall cease to be a commercial article is a *brutum fulmen*. It is again a judicial question whether it is reasonable, and in the beef cases absolutely, and in the liquor, oleomargarine, and cigarette cases to the extent of shipments in the original package and one sale, it is held that such legislation is inoperative as against the commerce clause of the Constitution. It would hardly be contended that if the vegetarians should elect a majority of the members of the legislature of a State and enact a law prohibiting the slaughter, sale, or use of any animals for food products this court would hold such act a valid exercise of the police power in any one of these respects.

Again, the State in the exercise of the same power has the unquestioned right to determine the terms upon which foreign corporations shall do business in the State with its citizens, and what the citizens may do with such company. But there are constitutional limitations upon this power also, as was settled in Allgeyer *vs.* Louisiana. These are all acknowledged limitations upon the police power, and the day has happily passed when this court must sit here to confess itself powerless to repel invasions of the liberty and property of the citizen by State agencies acting under the guise of police regulation. While it will not lightly and without grave cause set aside the deliberate action of the State, yet it will do so unhesitatingly when convinced that the act, either as passed or as construed, invades the property rights of the citizen and is not reasonably necessary to the end to be attained.

It is useless to attempt to follow counsel in his effort to show that an option is gambling *per se*. His discussion of that subject makes it painfully evident that he is unacquainted with commercial transactions as well as with actual gambling in grain. Under the rules of the Board of

Trade as well as the undisputed testimony in this case there can be no settlement on differences in such contracts. The witnesses testified they had never known a case (Record, pp. 20, 24). An option contract, like the one for which the plaintiff in error was indicted, the one involved in Schneider *vs.* Turner, *supra*, the coal contract in Corcoran *vs.* Coal Company, is no more gambling than is the purchase of a stock of goods for resale. One might say of the latter transaction that it is a bet that merchandise will go higher, that there will be a demand for merchandise of that character, etc. To make such assertion would not commend one's discrimination.

To say that options are a common means of gambling is to fly in the face of common knowledge as well as the adjudged cases. Attention has been called to the repeated declaration of the supreme court of Illinois that such contracts were valid at common law and had in them no element of immorality. The authorities showing that such is the universal rule in the absence of proof of intention to settle on differences are stated in Tiedeman's State and Federal Control of Persons and Property, pp. 474, 475, notes.

But this argument is beside the question. The State may destroy option contracts and punish gambling through option contracts, as it does for purchase and sale contracts, by limiting its action to contracts that had the element of gambling in them and its punishments to persons who gamble. It may not take away all right to contract conditionally nor punish the citizen who has done no wrong act. This is not the exercise of the police power; it is confiscation and despotism under the forms of law.

Respectfully submitted.

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